No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
Southern District of California
Honorable Harry C. Westover, Judge Presiding.

Appellants' Homer L. Woxberg, Sr., and Wayne Franklin Dykes Reply Brief.

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TOPICAL INDEX

Page

Introductory statement 1

Argument 3

I.

The prosecution and conviction of appellants under count one constitutes an ex post facto application of Section 501(c) in violation of Article I, Section 9(3) of the Constitution 3

1. The conversion, whether lawful or unlawful, occurred as a matter of law, at the time each refund check was deposited in the severance fund account 4

2. The evidence is insufficient to support a factual determination that the severance fund was, on November 2, 1959, money or property of the local union within the provisions of Section 501(c) 9

II.

The evidence is insufficient to support a conviction under count one for a violation of Section 501(c) because the conversion of the union funds was done openly and under a bona fide claim of right 12

III.

The evidence is insufficient to show fraudulent intent on the part of appellants with respect to count two 15

IV.

The evidence is insufficient to show any taking or fraudulent intent on the part of appellant Woxberg to sustain convictions under counts nine and ten 16

V. Page

Appellants complied with Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure with respect to the errors in the giving and refusing of certain instructions 17

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases — Page

Dyer v. Occidental Life Insurance Company of America, 182 F. 2d 127 6

Hooker v. Hoey, 27 F. Supp. 489 6

Martin v. Kansas City Southern Railroad Company, 197 F. Supp. 188 6

Strangway v. United States, 312 F. 2d 283 18

United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776 15

Rules

Federal Rules of Criminal Procedure, Rule 18(d) .. 17

Federal Rules of Criminal Procedure, Rule 30 ..... 17, 18

Statutes

Landrum-Griffin Act, Sec. 501(a) 5

Landrum-Griffin Act, Sec. 501(c) ..1, 3, 6, 7, 8, 12

United States Code, Title 18, Sec. 3282 8

United States Constitution, Art. I, Sec. 9(3) 8, 9

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Introductory Statement.

The crux of this appeal is the question of whether or not Section 501(c) of the Landrum-Griffin Act has been applied retrospectively with respect to the creation and dissolvement of the Severance Fund, Count One of the Indictment. In addition to erroneously stating Appellants' position as to Count One, Appellee in its brief has in the most part avoided meeting the legal contentions raised in our Opening Brief on this

point. Certain arguments were presented by Appellee which merit some comment and we will meet and answer these in our argument to follow.

The facts, we submit, have been adequately summarized in our Opening Brief and no useful purpose would be served here by repeating the essential facts. Appellee's statement of the facts adds nothing to the determination of the issues presented as to Count One except to attempt to unduly color the evidence in a light most favorable to its position. In our argument to follow we will make specific reference where necessary to the evidence and in particular will point out wherein the evidence has been misstated in Appellees' Brief.

ARGUMENT.

I.

The Prosecution and Conviction of Appellants Under Count One Constitutes an Ex Post Facto Application of Section 501(c) in Violation of Article I, Section 9(3) of the Constitution.

Appellee erroneously takes the position in its brief that Appellants' attack on Count One is solely a question of insufficiency of the evidence (Appellee's Br. pp. 4, 5, 30, 31-37, 43-45). In fact only in one place in Appellee's Brief is Appellants' "*ex post facto* argument" even mentioned and then it is dismissed without adequate argument or authorities (Appellee's Br. pp. 43-45). Appellee's entire argument in answer to our threefold attack on Count One is an assertion that the evidence is sufficient to support a factual determination that the Severance Fund was money, property and assets of Local 224 (Appellee's Br. pp. 31-45). As demonstrated in our Opening Brief and in the argument to follow, this was only one aspect of Appellants' attack on Count One.

First, as a matter of law, the conversion, lawful or unlawful, occurred when the insurance refund checks were deposited in the trust fund account, all of which occurred prior to the effective date of the passage of the Landrum-Griffin Act. Therefore the prosecution and conviction of Appellants under Count One constitutes an *ex post facto* application of Section 501(c). Accordingly, the District Court's instruction that this was a question of fact was in error (Appellants' Br. pp. 21-23; 33).

Second, even if we assume for sake of argument that this was properly a question of fact for the jury, the

evidence is insufficient to support the factual determination that the Severance Fund at the time that it was dissolved was an asset of Local 224 (Appellants' Br. pp. 24; 39). To the contrary, all of the evidence indicates without contradiction that title and ownership of the Severance Fund was in the trustees and not in the Union. Therefore, no conversaion of union property or assets occurred on November 2, 1959 when the Severance Fund was dissolved.

Third and finally, the evidence is insufficient to support a conviction under Count One because the conversion of the alleged union funds was done with the consent of the Local Union and under a bona fide claim of right. Therefore, the appropriation of the insurance refund checks was not unlawful as a matter of law (Appellants' Br. pp. 24-26; 42, 55).

1. The Conversion, Whether Lawful or Unlawful, Occurred as a Matter of Law, at the Time Each Refund Check Was Deposited in the Severance Fund Account.

Appellee states and Appellants concede that the refund checks at the time they were received by Appellants as union officials were property of Local 224. Appellee then asserts:

> "Accordingly the Severance Fund was the asset and property of Line Drivers Local No. 224 on November 2, 1959, unless prior to that date the local transferred its interest in those funds to another." (Appellee's Br. p. 31.)

This may be true but it is not necessarily determinative of the time of the alleged wrongful conversion in this case. It is certainly true that if the insurance

refund checks were converted *legally* prior to November 2, 1959, they would no longer be union funds. This is the gist of just one aspect of Appellants' attack on Count One. For we argued that Appellants acted under the authority of the By-laws of the Local Union when they created the Severance Fund and transferred the insurance refunds to the trust account as additional wages. Therefore, their conduct was not criminal, since they did that which they had the right to do and by this action title to the insurance refunds passed to the trustees (Appellants' Br. pp. 36-39; 42-54).

Appellee's answer to this contention was that because the Severance Fund was not the result of a "negotiated contract" it was not wages under the case authorities cited in our Opening Brief (Appellee's Br. pp. 44-45). This does not follow. Appellee concedes that Appellants' conduct of the affairs of the Local were governed by the By-laws (Appellee's Br. pp. 13-15). Therefore, it should follow that Appellants had the right to fix their wages with the approval of the Executive Board, as provided in the By-laws.[1] The evidence is uncontradicted that this function was regularly carried out in establishing the Severance Fund [Executive Board Meeting of March 27 and April 1, 1955, Ex. 44].

Does the fact that the Severance Fund was created for its paid employees under the authority of the By-laws of the Local Union, make it any less "wages"

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[1]Congress clearly had this exception in mind when they drafted the Landrum-Griffin Act. See specifically Section 501(a) and our argument with reference thereto on pp. 42-53, Appellants' Opening Brief.

under the authorities pertaining to pensions that Appellants have cited in their Opening Brief, as distinguished from a "negotiated contract" between a union and employer? Certainly not. It is well settled that union by-laws are just as binding on union members as the provisions of a "negotiated contract" between union and employers. [*Dyer v. Occidental Life Insurance Company of America,* 182 F. 2d 127, 130 (9th Cir. 1950); *Martin v. Kansas City Southern Railroad Company,* 197 F. Supp. 188, 191 (W.D.L.A. 1961)]. Furthermore, in *Hooker v. Hoey,* 27 F. Supp. 489 (D.C.N.Y. 1939), the pension plan under discussion was created unilaterally and voluntarily by the employer and was not the result of a "negotiated contract". Nevertheless, this still constituted wages to the employee (27 F. Supp. at p. 490).

Under these authorities and in this instance, it would follow that the Severance Fund constituted wages and that legal title passed to the trustees of the Severance Fund. Therefore the insurance refund checks were no longer property or assets of the Union when the Trust was dissolved on November 2, 1959.

If this is not true, then the insurance refunds were wrongfully appropriated in the first instance when the checks were endorsed by Appellants and deposited in the Severance Fund account. Thus, it is Appellee and not Appellants who is skewered on the horns of a dilemma. For the first appropriation, whether legal or illegal, forecloses prosecution and conviction under 501(c). In the first instance because nothing unlawful was done, and in the second instance because of well established constitutional principles prohibiting *ex post*

facto application of Federal legislation and Appellee cannot argue one position without admitting the other.[2]

Appellee, in a futile attempt to escape the horns of this dilemma, states at page 36 of its brief:

> "In view of this factual determination supported by the evidence [an erroneous premise which we will come back to in a moment] that Line Drivers Local No. 224 did not transfer the experience rated refunds to a trust, it is clear that ownership of the fund and income derived therefrom was and remained the money, fund, securities, property and assets of Local 224." (Bracketed words ours.)

Appellee supports this erroneous conclusion with citation to provisions of the California Civil Code involving involuntary trustees. They assert that since a person who wrongfully misappropriates another's property holds that property as an involuntary trustee for the rightful owner, there was no conversion in law under 501(c) at the time the insurance refund checks were transferred to the trust (Appellee's Br. pp. 36, 37). This is again a *non sequitur* and with all due respect to counsel for Appellee, a specious argument.

It is certainly true that anytime money or other property is wrongfully misappropriated, converted, or stolen, the owner can in a civil action recover that which is rightfully his. What Appellee fails to recognize is that the owner's basis for bringing an action to secure the return of his property within the purview of the involuntary trustee sections is that there has been in the first instance a wrongful conversion.

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[2]See argument in detail on this point in Appellants' Opening Brief, Point I, Subdivision 1, pp. 27-39.

Title does not pass because of the alleged criminal conversion. Thus in the case at bar if Appellants held the insurance refunds on November 2, 1959 as involuntary trustees as Appellee contends, then they did so because of the alleged wrongful appropriation in the first instance—when each refund check was endorsed and deposited in the Severance Fund account. Such wrongful appropriation would, if the Landrum-Griffin Act had been law, give rise to possible criminal prosecution under 501(c). The Government cannot, however, base a prosecution on a law which did not exist at the time of the initial wrongful conversion merely because the "involuntary trustees" make a subsequent transfer of the same funds—here the dissolution of the Severance Fund on November 2, 1959. Such conduct (a subsequent transfer) would not avoid the bar to prosecutions established by Title 18 U. S. C., Section 3282,[3] and cannot be used to avoid the application of Article I, Section 9(3) of our Constitution.

Thus Appellee cannot argue in one instance that the first appropriation was not lawful and passed no title to the trustees because it was done without authority and with fraudulent intent (and the trustees thereby held the property only as involuntary trustees), and then in the next breath argue that the criminal conversion occurred some four years later when the "illegal" trust was dissolved without authority and with fraudulent intent. For this argument not only misconstrues the legal effect of the doctrine of involuntary trust, but does not conform with well settled principles of criminal law requiring the union of act and intent, a legal, not factual, contention by Appellants which went

[3]Five year limitation on commencing prosecutions in non-capital cases.

unanswered in Appellee's Brief (Appellants' Br. pp. 33-36).

Therefore as a matter of law the conversion, if it were wrongful, occurred when the insurance refund checks were originally deposited in the Severance Fund account, all of which occurred prior to the effective date of the passage of the Landrum-Griffin Act. We submit that the prosecution and conviction of Appellants as to Count One constitutes a violation of Article I, Section 9(3) of the Constitution.

2. The Evidence Is Insufficient to Support a Factual Determination That the Severance Fund Was, on November 2, 1959, Money or Property of the Local Union Within the Provisions of Section 501(c).

The main thrust of Appellee's argument in response to our attack on Count One is that the evidence is sufficient to support a factual determination that the Severance Fund was property of the Union on November 2, 1959. In the first instance, Appellee contends that the evidence was contradictory on this issue (Appellee's Br. pp. 32 and 33). We ask this question: What contradictory evidence? No citation is made to the record, and it is certainly axiomatic that any point urged in argument which is not supported by proper reference to the record is without merit and cannot be considered.

Later on, Appellee seemingly sets forth what it contends are eight specific instances in which the evidence supports a factual determination that the Severance Fund constituted an asset of the Local Union (Appellee's Br. pp. 34-36). None of this evidence contradicts in any manner the evidence summarized in our Brief at pages 39 and 40, which indicates that the funds were

transferred from the Union to the trustees when the insurance refund checks were initially endorsed and deposited in the Severance Fund account. For example, what possible difference on the question of who owned the insurance refund checks could arise from the fact that on April 3, 1955, the date the Executive Board approved the creation of the Severance Fund, the general membership, at a special meeting, was engaged in a strike vote? Again, the fact that the final draft of the Executive Board Minutes was not delivered until some time later, though approved on April 1, 1955, could not possibly mean that title to the insurance refund checks, now in the Severance Fund, still belonged to the Union (Appellee's Br. p. 35).

Appellee has again, as throughout its entire Brief, ignored the principles of syllogistic reasoning in urging this point. For its minor premise—that there is conflicting evidence on this point—is unsupported by the record. To the contrary, the only evidence appearing on this point unequivocally indicates that title to the refund checks passed to the trustees of the Severance Fund as each check was endorsed and deposited in the fund account. We have, first, Exhibit E, the Trust Agreement, which by its terms establishes dominion and control over the insurance refunds as they are transferred from the Union to the Trust. Second, we have the uncontradicted testimony by the attorney who drafted the Trust instrument, Perkins, a qualified expert in this field, that the funds belonged to the Trustees and not the Union [Rep. Tr. p. 1818, line 1, to p. 1819, line 2; p. 1829, line 5, to p. 1831, line 17].

Therefore, there being no contradictory evidence on this point, Appellants' proposed Jury Instruction No. 47

should have been given, and it was error for the District Court to instruct that this was a question of fact [Rep. Tr. p. 2778, line 8, to p. 2779, line 22].

Finally, Appellee asserts that the Severance Fund was still money or property in the hands of the Union, though segregated, because the dissolution of the Severance Fund on November 2, 1959 was "the first exercises of dominion or control over these funds exercised by appellants and their co-defendants; this was the first step beyond the 'locus penitentiae'" (Appellee's Br. p. 42).

This argument is clearly not supported by the record and is without merit. In 1957, Appellants and their co-defendants as trustees, exercised the same kind of dominion and control over the Severance Fund by paying to Gladys Rang's Estate her proportionate share of the then existing fund, based upon the provisions for distribution under the Trust Agreement, Exhibit E [Rep. Tr. p. 165, line 2, to p. 167, line 19; Ex. 54]. The same formula for making this partial distribution was used in 1959 when the remainder of the Severance Fund was dissolved [Rep. Tr. p. 167, lines 20-22]. Such conduct, if necessary to establish the first step beyond the 'locus penitentiae" of which Appellee speaks, also occurred before the effective date of the passage of the Landrum-Griffin Act. If there ever was any embezzlement or wrongful appropriation, it would have occurred when the Union lost its ability to exercise its incidents of ownership over the insurance refunds. This is not only evidenced by the action of the trustees in making distribution to Gladys Rang's Estate, but also their action in investing these funds in second trust deeds, which conduct likewise occurred be-

fore the passage of the Landrum-Griffin Act [Rep. Tr. p. 109, line 15, to p. 116, line 22].

Therefore, if there were a factual question for the jury to determine, the uncontradicted evidence supports Appellants' contention that the Severance Fund was not money or property of the Local Union, within the provisions of Section 501(c), on November 2, 1959.

II.

The Evidence Is Insufficient to Support a Conviction Under Count One for a Violation of Section 501(c) Because the Conversion of the Union Funds Was Done Openly and Under a Bona Fide Claim of Right.

Appellants have, we submit, adequately set forth their position on this point in their Opening Brief at pages 55 to 63. Appellee makes no effort to answer the position taken by Appellants, that there can be no larceny or embezzlement when one takes another's property under a bona fide claim of ownership or right, which in this instance is based upon the authority conferred upon Appellants and the Executive Board under the Union's By-laws (Appellants' Op. Br. pp. 55-56). The main crux of Appellee's argument, that the evidence was sufficient to establish fraudulent intent, is based upon its view of the evidence that Appellants concealed the creation and dissolvement of the Severance Fund from the rank and file members (Appellee's Br. pp. 41-42). This argument is not only not supported by the record, but Appellee, in its Statement of Facts, has erroneously stated the record. On page 25 of its Brief, Appellee states:

> "During the entire period in which the Severance Fund was in existence no mention was made of it

> to the rank and file members of Local 224 [R. T. 237, 346, 347, 348, 512, 589, 633, 693, 697, 698, 2543, 2557, Exs. 40, 43, 44 and 45], or to the rank and file members of the Executive Board [R. T. 238, 348, 515 and 550] and no mention was ever made of the fact that Occidental Insurance Company made annual 'Experience Rating Refunds' [R. T. 2558]."

This is not the fact. Each witness who testified concerning knowledge of the rank and file members of the existence of the Severance Fund, testified, not that there was no mention ever made of the Severance Fund, but that they had no memory as to whether it was ever mentioned at the general membership meetings that they attended. That this is the record can only be gleaned from a reading of both the direct and cross-examination of each witness who testified on this point. To assist the Court in reviewing this part of the record, we offer the following table of citations to the Transcript:

Witness	Appellee's References	Additional Testimony on the Same Point
McBride	R. Tr. p. 237.	R. Tr. p. 248, line 9 to p. 249, line 10; p. 259, lines 3-20.
Wassen	R. Tr. pp. 346, 347, 348.	R. Tr. p. 350, line 9 to p. 352, line 25.
Layman	R. Tr. pp. 512, 515.	R. Tr. p. 561, line 14 to p. 570, line 12.
Ottesen	R. Tr. p. 589.	R. Tr. p. 605, line 13 to p. 607, line 6; p. 612, line 21 to p. 613, line 14.
Logan	R. Tr. p. 633.	R. Tr. p. 638, line 21 to p. 639, line 22.
Carl	R. Tr. pp. 693, 697, 698.	R. Tr p. 712, line 4 to p. 713, line 19; p. 725, line 14 to p. 745, line 17.
French	R. Tr. p. 2543.	R. Tr. p. 2532, line 14 to p. 2538, line 9.

More particularly Appellee asserts that no mention was ever made of the "experience rating refunds" from Occidental Life Insurance Company, citing on page 2558 of the Transcript the testimony of McConachie, a rank and file member of the Executive Board during that period of time (Appellee's Br. p. 25). This again is not the fact, as McConachie's testimony was just exactly to the contrary. He testified that he had heard of such refunds while a member of the Executive Board [Rep. Tr. p. 2556, line 18, to p. 2558, line 14].

Thus, from an examination of the entire record, the most that can be said concerning this aspect of the case is that none of these witnesses had any recollection as to whether or not the Severance Fund was or was not mentioned during Executive Board Meetings or at the General Membership Meetings. However, the written record is to the contrary, as evidenced by the Minutes of both the Executive Board and General Membership Meetings [Exs. 43 and 44; summarized in Appellants' Statement of Facts, Opening Br. pp. 3-16].

In this connection Appellee again incorrectly states the record when on page 22 of its brief it is stated that "Woxberg was advised by Perkins to get the approval of the membership to such a distribution. This advice was not followed unbeknownst to Perkins." This is not the fact. Not only did the Executive Board approve the dissolution of the Severance Fund [Minutes of September 27, 1959, Ex. 44], but the minutes of the Executive Board were read and approved at the General Membership Meeting and a motion calling this matter to the attention of the general membership was made from the floor and carried as reflected in

the Minutes of the General Membership Meeting of September 27, 1959 [Ex. 44].

Based upon this record and the fact that the Appellants acted under the advice of an attorney[4], Perkins, and under at least a *bona fide* claim of right as delineated by the authority granted to them by the By-laws of the Local Union, the evidence is insufficient to support a finding of fraudulent intent.

III.

The Evidence Is Insufficient to Show Fraudulent Intent on the Part of Appellants With Respect to Count Two.

Here again, Appellee fails to meet the main thrust of Appellants' argument on this point. As stated in our Opening Brief, it is Appellants' contention as a matter of law, that the employees under a pension plan are entitled to the moneys due them without deducting expenses, which is exactly what happened in the case at bar (See *United States v. Carter,* 353 U. S. 210, 77 S. Ct. 793, 1 L.ed 2d 776 (1957)].

Again, Appellee in arguing the evidence under Count Two incorrectly states the record when at page 47 of its Brief it is asserted that ". . . appellant *Woxberg instructed the office manager Dorothy Johnson* to include a payment to 'Larry McBride—Arbitration Audit—$200'." This again is not the fact. Dorothy Johnson testi-

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[4]Appellee in a footnote on page 17 of its brief attempts to draw an unfavorable inference that Appellants acted in bad faith because they did not consult the regularly retained Union attorneys in the creation and dissolution of the Severance Fund. However, since none of these attorneys were called as witnesses, there is no showing that they would have testified any differently than Perkins, the attorney who did advise Appellants and who did draft the trust agreement and the dissolution agreement.

fied that she had no recollection as to who told her to use the words "Arbitration Audit"; that it might just as well have been a mistake or misunderstanding on her part [Rep. Tr. p. 992, line 12, to p. 994, line 14]. Certainly such evidence is at least as consistent with innocence as with guilt and is not the kind of substantial evidence necessary to support a conviction, even when viewed in a light most favorable to the government.

IV.

The Evidence Is Insufficient to Show Any Taking or Fraudulent Intent on the Part of Appellant Woxberg to Sustain Convictions Under Counts Nine and Ten.

With respect to Counts Nine and Ten, it has been the position of Appellant Woxberg from the beginning that he never was a participant in the acts upon which the government relied in these transactions. During the entire period when the jeep repairs were made and paid for, Appellant Woxberg was out of the United States [Rep. Tr. p. 1520, line 20, to p. 1521, line 5; p. 1522, lines 2-3; p. 1537, lines 9-22].

The evidence is uncontradicted that all of these acts were performed by other defendants, namely Dykes and Hester, and both of these defendants were acquitted by the verdict of the jury. It is, therefore, impossible to understand how a person who took no part in the transaction could be found guilty, while those who took part in it were found not guilty.

On page 49 of Appellee's Brief it is asserted that after the criminal investigation "uncovered" the jeep transaction, Dykes "contacted" Appellant Woxberg, and he then repaid the Union for the repair bills. By this

Appellee attempts to leave one with the impression that Appellant Woxberg paid this after he heard about an investigation. This is not true. There was absolutely *no* evidence that Appellant Woxberg paid these bills after he learned of any investigation. The *facts* indicate that Dykes did what Appellant Woxberg had previously asked him to do. He sent a bill to Appellant Woxberg which was the only bill that Appellant Woxberg ever received. Appellant Woxberg, immediately upon receipt, paid the exact amount requested [Rep. Tr. p. 1395, line 10, to p. 1397, line 11; Ex. M]. If Dykes had sent the bill earlier, the payment would have been made earlier. There was no evidence to the contrary.

Therefore, there being no evidence of a fraudulent taking by Appellant Woxberg, his conviction under Counts Nine and Ten should be reversed.

V.

Appellants Complied With Rule 18(d) and Rule 30 of the Federal Rules of Criminal Procedure With Respect to the Errors in the Giving and Refusing of Certain Instructions.

Appellee contends that Appellants failed to comply with Rule 18(d) in setting forth their specification of errors as to the giving and refusing of certain instructions. Apparently Appellee interprets Rule 18(d) as requiring not only the instruction being set out *"totidem verbis"*, but also that part of the record wherein specific objection is made (Appellee's Br. p. 51). Appellants know of no authority placing such an interpretation upon Rule 18(d) and we submit without further argument that we have complied with this rule in that respect.[5]

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[5]See citations to the record as required by Rule 18(d) on pp. 21-26.

Appellee also contends we failed to comply with Rule 30 (Appellee's Br. pp. 51-59). The District Court, in chambers with the consent of all counsel, including counsel for the government, specifically took the position that with respect to instructions given and refused, everything that was done by the court was deemed automatically accepted to [Rep. Tr. p. 2696, lines 1-10; p. 2801, line 1, to p. 2804, line 13]. Furthermore, how can Appellee take the position on appeal that Appellants have not complied with Rule 30 when it acquiesced in the procedure adopted by the District Court with respect to the objections to instructions [Rep. Tr. p. 2804, lines 1-12].

Specific mention should be made here of the District Court's failure to give defendants' proposed Jury Instruction No. 38 concerning circumstantial evidence and reasonable doubt [Clk. Tr. p. 175]. Appellee asserts that it is this Circuit's position that failure to give this instruction is not error, citing *Strangway v. United States,* 312 F. 2d 283 (9th Cir. 1963). This case, however, as this Court well knows, did not on this point make a decision on the merits because specific objection to this instruction had not been raised in appellants' opening brief (312 F. 2d at p. 285). Even if this Circuit has taken this position, this does not prevent Appellants from urging this Court to reconsider the prejudicial effect of the failure to give this instruction in circumstantial evidence cases.

Conclusion.

Based upon the authorities and arguments presented here and in Appellants' Opening Brief, the convictions of Appellants as to Counts One, Two, Nine and Ten should be set aside.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ROBERT A. NEEB, JR.